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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK,
As Executor of the Estate of
SOL SIMONS, Deceased,
Respondent.

BRIEF FOR RESPONDENT ON THE MERITS

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IN THE

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OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
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vs.

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As Executor of the Estate of
SOL SIMONS, Deceased,
Respondent.

BRIEF FOR RESPONDENT ON THE MERITS

PREFACE

At the threshold, it is imperative to bring this case into precise and proper focus. This is not a case of a sister state refusing to recognize, contrary to the constitutional requirements of full faith and credit, a final decree of another state. It is an attack in Florida on a Florida final decree of divorce, dated April 30, 1952, brought in the Florida court of rendition by the divorced wife (petitioner), who had notice and an opportunity to defend the Florida divorce proceeding when it was instituted on March

11, 1952, ten (10) years prior to the present challenge upon the resultant decree; but, who, ten (10) years earlier, elected to ignore the Florida proceeding. Florida did not fail to give recognition to the earlier New York separate maintenance decree providing the petitioner with alimony. The Florida decree did not in any way whatever disturb, change, or affect the New York decree. The petitioner failed to assert the now claimed res adjudicata effect of the New York separate maintenance decree as an affirmative defense in the Florida divorce proceeding. Actually, no court has either decided or considered the *res adjudicata* effect of the New York separate maintenance decree because it was not raised as an affirmative defense in the divorce suit, and its attempted assertion ten (10) years later in this suit, in the court of rendition, comes too late and is precluded. Hence, petitioner seeks review of something that she failed to appropriately raise and which was in fact never decided when and where it should and could have been considered. This is an obvious attempt to turn this, the highest court in the land, into a trial tribunal.

Totally removing this case from the realm of a genuine full faith and credit question, the petitioner, after her former husband, Sol Simons, died (on October 26, 1960), filed, pursuant to the applicable Florida Statutes (Florida Statutes, Chapter 731.35 (1); Appendix, p. A1), an election to take dower. It is undisputed that the estate of Sol Simons consists entirely of personalty and that the jurisdiction to probate such property follows the domicile of the decedent. There is and never has been a question regarding any property of Sol Simons located outside of Florida. The petitioner's election to take dower, as the governing Florida statute requires, was executed by her on her oath. She swore in that election to take dower, which was filed in the Florida probate proceeding, which

is the only probate proceeding pending anywhere involving Sol Simons' estate, that Sol Simons died a domiciliary of the State of Florida. The pertinent content of the petitioner's election to take dower reads as follows (Def. Ex. R; R. 306, p. 202):

> "Lucy C. Simons, the widow of Saul Simons, Deceased, *who died while a resident of Dade County,* Florida; being dissatisfied with the portion of the estate of her husband to which she is entitled under the will of her husband, does hereby elect to take dower in the estate of her husband as provided by law." (Emphasis supplied)

There never has been a contest in regard to the jurisdiction of the Florida Probate Court over the estate or any part thereof of the deceased, Sol Simons. The Petitioner's election to take dower constitutes a demand for the Florida Probate Court's aid and is an affirmation of that court's jurisdiction. Consequently, no state in the union is involved except Florida, which was asked by the petitioner to vacate its own decree in order to allow her to take a dower interest in a Florida estate of a deceased Florida domiciliary to which she was not entitled under the laws of Florida.

FLORIDA STATUTES INVOLVED

The following is a list of the Florida Statutes involved in this case which are quite lengthy; thus their text is set forth in the appendix to this brief:

1. § 731.35 (1), Florida Statutes, 1959, Entitled: "Election To Take Dower."

2. § 65.01, Florida Statutes, 1951, Entitled: "Divorce To Be By Bill In Equity."

3. § 65.02, Florida Statutes, 1951, Entitled: "Residence Required."

4. § 65.03, Florida Statutes, 1951, Entitled: "All Grounds To Be A Vinculo."

5. § 65.04, Florida Statutes, 1951, Entitled: "Grounds For Divorce."

6. § 65.06, Florida Statutes, 1951, Entitled: "Proceedings Against Nonresident Defendants."

7. § 48.01 (4), Florida Statutes, 1951, Entitled: "Service Of Process By Publication, In What Cases."

8. § 48.02 (1), Florida Statutes, 1951, Entitled: "Service Of Process By Publication, Upon Whom."

9. § 48.03, Florida Statutes, 1951, Entitled: "Sworn Statement As Condition Precedent".

10. § 48.04, Florida Statutes, 1951, Entitled: "Sworn Statement, Natural Person As Defendant".

11. § 48.08, Florida Statutes, 1951, Entitled: "Notice To Appear, Form".

12. § 48.09, Florida Statutes, 1951, Entitled: "Notice To Appear, Return Day".

13. § 48.10, Florida Statutes, 1951, Entitled: "Notice To Appear, Publication, Proof And Recording Thereof".

14. § 48.13, Florida Statutes, 1951, Entitled: "Notice To Appear, Mailing of".

15. § 48.14, Florida Statutes, 1951, Entitled: "Time For Appearance, Decrees Pro Confesso And Default Judgments".

16. § 59.08, Florida Statutes, 1951, Entitled: "Time For Taking Appeals Or Filing Petitions For Certiorari".

STATEMENT OF THE CASE

The factual background of every case is important but in this case it is extremely important for two (2) reasons:

a) That an accurate presentation of the facts will reveal that there has not been any violation of the full faith and credit clause of the United States Constitution; and

b) That Petitioner has not accurately presented the facts of this case and has, thereby, created a false impression that Sol Simons was a New York domiciliary and that Florida has somehow deprived the petitioner of some right that she was entitled to under the New York separate maintenance decree. In regard to the latter, it will be demonstrated in the argument section of this brief that petitioner has, wittingly or otherwise, attempted to transpose her right to alimony, which ceased upon the death of her former husband and which she was never deprived of, into an unjustified right to a dower share of her former husband's estate. Under these circumstances, the respondent is constrained to accurately restate this case in accordance with the record.

A) The Facts Before the Florida Divorce Suit Was Commenced

The petitioner, Lucy C. Simons, instituted separate maintenance proceedings in New York in 1946 and obtained a separate maintenance decree allowing her alimony. In September, 1951, petitioner applied in the New York separate maintenance proceeding for an increase of alimony. (R. 92) Her lawyer, Jerome Mayer, testified that he had no present recollection of the matter and did not dispute the testimony he heard given by Myron J. Greene, Sol Simons' lawyer. (R. 87-91) Greene testified that

shortly after the proceeding for an increase in alimony had begun in New York, Sol Simons left the state of New York and established permanent residence in Florida. (R. 92-93) From correspondence in Greene's file (which was admitted in evidence as Def. Ex. Q; R. 303-305, p. 202), Greene testified that Sol Simons moved to Florida prior to November 19, 1951. (R. 93)

At this juncture, it is significant to consider certain conclusive documentary evidence. Sol Simons executed, under oath, a "Declaration of Domicile and Citizenship" addressed to the State and County Tax Assessor for Dade County, Florida, dated November 29, 1951, which was recorded among the public records of Dade County, Florida, on December 10, 1951, bearing Dade County Circuit Court Clerk's File No. AA 123940, which states (Def. Ex. A; R. 271, pp. 155-156):

> "This is my declaration of Domicile and Citizenship in the State of Florida that I am filing this day in accordance, and in conformity with Chapter 20412 Laws of Florida, Acts of 1941.
>
> I was formerly a legal resident of New York City, N. Y. and I resided at 6910 Yellowstone Boulevard. However, I have changed my domicile to and am and have been a bona fide resident of the State of Florida since the 19th day of November, 1951, and I reside at 1110 Venetian Way, Miami Beach, Dade County, Florida, and this statement is to be taken as my declaration of citizenship, actual legal residence and domicile in the State of Florida.
>
> I have signed a one-year's lease for my present apartment at 1110 Venetian Way, Miami Beach, Florida, and have become associated with Fruit Sales Corporation, a Florida concern.
>
> I Further Certify that I will register at my local address when the registration books reopen, and com-

ply with all other requirements of a legal resident of this State.

I Further Certify that I have no intention to return to my former domicile, and I intend to remain in Miami Beach, Dade County, Florida, permanently.

/s/ Sol Simons
1110 Venetian Way, Miami Beach"

The apartment lease referred to in the above-quoted "Declaration of Domicile and Citizenship" was admitted in evidence as a part of a composite exhibit containing nine (9) yearly leases, each of which was executed by Sol Simons and his landlord. (Def. Ex. B; R. 272-273, 157) The first lease (the one specifically mentioned in the declaration of domicile) was dated November 17, 1951, and covers the term of one (1) year from December 1, 1951 to November 30, 1952, and demises to Sol Simons the residential premises at 1110 Venetian Way, Miami Beach, Dade County, Florida. (R. 273) A yearly lease for every year thereafter, up to and including 1960, was executed by Sol Simons and his landlord for the same residential premises, namely, 1110 Venetian Way, Miami Beach, Dade County, Florida. The last lease signed by Sol Simons is particularly significant because the expiration date is November 30, 1960, and the man died one month before that, on October 26, 1960. (R. 272) The pertinence of these uncontradicted facts is a demonstration that the record does not substantiate the oft repeated unsupported statement in petitioner's brief that Sol Simons died a resident of New York. It is incredible that petitioner can make that statement in her petition and brief in the face of her own sworn election to take dower that specifically declares to the contrary. (Def. Ex. R; R. 306, 202) Additionally these facts establish that Sol Simons was a bona fide resident and domiciliary of the State of Florida for the prerequisite

period of time prior to the institution of the Florida divorce suit and that Florida had jurisdiction of the marital res. It also demonstrates the gross inaccuracy of petitioner's unsupported accusation that Sol Simons came to Florida as a transient divorce seeker.

The New York proceeding for an increase of petitioner's alimony was heard in New York on January 29, 1952. (R. 94) Sol Simons testified at that hearing, in the petitioner's presence, that he was a permanent resident of Florida, residing at 1110 Venetian Way, Miami, Florida. (Pl. Ex. 4; R. 240-267, 94). The petitioner, on cross-examination at the trial of this cause, admitted that she heard Sol Simons testify, at the alimony increase hearing on January 29, 1952, that he was a permanent resident of Miami, Florida (R. 207-208):

> "Q. You were present, Mrs. Simons, in court in New York on January 29, 1952, when your husband testified before the Honorable David L. Weil, the official referee. Is that right?
>
> A. Yes.
>
> Q. You heard him testify, did you not?
>
> A. Yes.
>
> Q. You heard him testify at that time, in that hearing, that he was a resident of Florida, and his address was 1110 Venetian Way, Miami, Florida. Is that correct?
>
> A. He testified to that, yes."

There are additional facts that establish that Sol Simons was a bona fide resident and domiciliary of Florida, and not a migratory divorce hunter, as the petitioner glibly charges without foundation in fact. At the

increase hearing in New York, Sol Simons testified that he transferred his business bank account from a New York bank to the Miami Beach First National Bank (the respondent). The testimony reads as follows (R. 251):

> "The Chase account was transferred to the Miami Beach First National Bank and that is where it is. Just a transfer of funds and a continuation."

The Miami Beach First National Bank (the respondent) is executor of Sol Simons' estate. The respondent became Sol Simons' bank, was named as his executor in his last will and testament, dated May 7, 1952 (Def. Ex. S; R. 307, 203), and remained such until his death some eight (8) years later. Sol Simons' last will and testament states at the outset (R. 307):

> "I, Sol Simons, of the County of Dade, the State of Florida, ..."

The will was witnessed by three (3) Florida residents. (R. 315) Furthermore, Sol Simons, when he made Florida his domicile, formed a Florida corporation named Fruit Sales, Inc. That business entity was organized on November 19, 1951. A composite exhibit in evidence (Def. Ex. H; R. 284, 163), contained the original corporate charter and the annual corporate reports for the years 1951 through 1960, which were filed in the office of the Secretary of State for the State of Florida, and each states, under oath, that Sol Simons was the president and director of Fruit Sales, Inc., residing at 1110 Venetian Way, Miami, Florida. Sol Simons' accountant, Sidney Wasserman (a Florida Certified Public Accountant) testified that Sol Simons became his client in November, 1951. (R. 172) Wasserman testified that Sol Simons filed his 1952 estimated federal income tax return in Florida, and all of his subsequent yearly federal income tax returns were filed in Florida. (R. 173)

Sol Simons' federal income tax returns for the years 1952 through 1960 were admitted in evidence as a composite exhibit. (Def. Ex. J; R. 288, 176) The accountant testified that the New York apartment that Sol Simons retained, after he moved to and became a permanent resident of Florida, was deducted, after 1951, as a complete and total business expense on his federal income tax returns. (R. 177-178) Sol Simons' lawyer, Seymour Liebman, testified that Sol Simons retained the New York apartment strictly as a business office, as his New York headquarters, since he was frequently required because of business to be in the northeastern part of the country. (R. 169) The record undisputedly reflects that Sol Simons was a commission broker who traveled extensively throughout the nation and the world, buying and selling crops of fruit for canning, preserves, wine making and freezing. (See as exemplary R. 164, 168-169, 248-249 and 263)

B) The Florida Divorce Suit

The entire record of the Florida divorce proceeding was admitted in evidence as a composite exhibit. (Pl. Ex. 3; R. 211-239, 17) On March 11, 1952, the bill of complaint for divorce was filed in the Circuit Court for Dade County, Florida, by Sol Simons, as plaintiff, naming Lucy C. Simons (petitioner) as defendant. (R. 211-216) Sol Simons complied with Florida Statutes, Chapter 65.02 (Appendix A1), requiring that the complainant in a divorce suit "must have resided ninety days in the State of Florida before the filing of the bill of complaint." The 11th day of March, 1952, was the one hundred and twelfth (112th) day after November 19, 1951, when Sol Simons became a permanent resident and domiciliary of the State of Florida The sworn bill of complaint for divorce strictly complied with Florida's constructive service statute. (Florida Statute, Chapter 48.04) (Appendix, p. A3) The complaint

stated, under oath, that diligent search and inquiry had been made to ascertain and discover the name and residence of the defendant who was over the age of twenty-one (21) years, and who resided in a state and county other than in Florida, and set forth with particularity that defendant's residence address was (R. 211):

"Lucy C. Simons
Hotel Beacon
75th Street at Broadway
New York, N. Y."

Notice of publication was duly issued by the Clerk of the Circuit Court in and for Dade County, Florida, on the day the bill of complaint for divorce was filed, namely, March 11, 1952, and such notice was duly published in a qualified newspaper, The Jewish Floridian, once each week for four (4) consecutive weeks on March 14th, 21st, 28th and April 4th, 1952, and gave the defendant (petitioner) up to and including April 11, 1952, within which to appear and answer. (R. 216-217) The defendant (petitioner) was, therefore, afforded the statutorily required twenty-eight (28) days notice to appear and defend. (Florida Statutes, Chapter 48.09, Appendix p. A5) The clerk's docket stamp reflects that a copy of the notice of publication, together with a copy of the bill of complaint were mailed to the defendant (petitioner) on March 14, 1952. (R. 217) The mailing of the notice of publication and the bill of complaint for divorce were in accordance with Florida Statutes, Chapter 48.13. (Appendix, p. A6) The publication of the notice and the proof thereof (R. 239), were in strict accordance with Florida Statutes, Chapter 48.10. (Appendix, p. A5) The notice of publication itself (R. 216-217), was in the form required by Florida Statutes, Chapter 48.08 (Appendix, p. A4) It will be observed from

the original court file containing the entire Florida divorce proceeding (Pl. Ex. 3; R. 211-239, 17), that each, every and all of the requirements of the applicable and governing provisions of the constructive service statutes (Florida Statutes, Chapters 48.01, 48.02, 48.03, 48.04, 48.08, 48.09, 48.10 and 48.13) (Appendix, pp. A2-A6), were in each, every and all instances and particulars meticulously observed and complied with.

The petitioner admits that she, as defendant in the original divorce suit, did reside at the Beacon Hotel, 75th Street and Broadway, New York, New York, during the year 1952. (R. 114) Moreover, petitioner admits that she received the notice of publication and bill of complaint in the Florida divorce proceeding. The record is peppered with that admission, typical of which is the following (R. 110):

> "Well, I got notice that he had advertised in a Jewish newspaper in Miami that he was suing me for divorce, and I was so startled. . . ."

It was at this point that the petitioner elected to ignore the Florida divorce proceeding. She admittedly had notice and an opportunity to be heard. She could have, but never did assert the now claimed res adjudicata effect of the New York separate maintenance decree allowing her alimony. Had the petitioner appeared and pleaded and proven the affirmative defense of res adjudicata in the divorce suit, the Florida court would have been confronted with the issue and the duty of deciding whether, in fact, the New York alimony decree, under the requirements of the full faith and credit clause of the United States Constitution, was res adjudicata of the cause of action for divorce in Florida. It will be demonstrated in the argument section of this brief that when faced with such an

issue, namely, the alleged res adjudicata effect upon a suit for divorce under full faith and credit of a sister state's separate maintenance decree, the court's inquiry is directed at determining if the causes of action are identical and if the identical facts in issue were actually previously adjudicated. It is not a peremptory matter, but one which, itself, requires judicial scrutiny and decision. It is exactly that issue which the petitioner would have this Court, thirteen (13) years later, decide de novo.

On April 15, 1952 (four (4) days after the expiration of the return day of April 11, 1952), the defendant (petitioner), having failed to either file her answer or otherwise plead in the divorce suit, the chancellor entered a decree pro confesso (R. 218-219), as was statutorily authorized by virtue of Florida Statutes, Chapter 48.14 (Appendix, p. A6). On that same day, April 15, 1952, the cause was duly referred to a special master in chancery who was "directed to take the testimony and report the same, together with his findings of fact and conclusions of law to the Court, with his recommendations". (R. 219) On April 24, 1952, the special master heard the cause (R. 225) and found, inter alia, the following (R. 226-227):

> "The plaintiff has, by competent and corroborated evidence, established that he is a bona fide resident of the State of Florida, and has been such resident for more than ninety (90) days prior to the 11th day of March, 1952, . . ."
>
> "The plaintiff has proved by his corroborated testimony the grounds for divorce alleged in his Bill of Complaint, . . ."

The master recommended that the plaintiff, Sol Simons, be awarded a "Final Decree of Divorce, A Vinculo Matrimonii, from the defendant, Lucy C. Simons." (R. 227)

On April 30, 1952, the chancellor entered a final decree of divorce which was filed on that same day and duly recorded among the public records of Dade County, Florida, on May 1, 1952, in Chancery Order Book 1030, at page 551. (R. 237-238) The final decree of divorce ratified and confirmed the master's report in every particular and provided for the severance of the bonds of matrimony, as follows (R. 237):

> "That the bonds of matrimony heretofore and now existing between the plaintiff, Sol Simons, and the defendant, Lucy C. Simons, be and they are hereby set aside and dissolved and the parties hereto are each of them divorced of and from the other a vinculo matrimonii."

It will be carefully noted that the final decree of divorce did not in any way whatsoever attempt to adjudicate the defendant's right to alimony. The New York separate maintenance decree providing petitioner with alimony remained undisturbed. While the Florida divorce proceeding was pending, the New York court, in the alimony increase proceeding, entered an order on April 1, 1952, increasing petitioner's alimony from $400 per month to $440 per month, retroactively effective October 11, 1951. (Pl. Ex. 5; R. 269, 97) The original New York alimony decree had been reversed by the appellate division of the New York Supreme Court and the amount of alimony reduced from $500 to $400. (R. 257) Petitioner has never contended that she was not paid by Sol Simons during his lifetime the alimony amounts to which she was entitled by virtue of the New York separate maintenance decree and either of its modifications (by appeal and then by increase). Actually, the petitioner concedes that Sol Simons paid her, until his death, every dime to which she was entitled. On page 29, of the petitioner's brief, she states:

"Up until the date of his death, he [Sol Simons] made the alimony payments to his wife. . . ."

The defendant-petitioner was furnished with a certified copy of the final decree of divorce. Seymour Liebman (the lawyer of record who represented Sol Simons in the Florida divorce proceeding) testified (R. 163-164):

"Q. After you had procured the final decree of divorce reflected by that file, did you procure from the Clerk a certified copy of the decree of divorce?

A. Yes, sir.

Q. How many copies do you recall you received?

A. Several. I do not remember whether it was three, four or five. But I know it was sevefal.

Q. After you received and procured photostatic copies of the final decree, what did you do in relation to the plaintiff here, Lucy Simons?

A. I mailed her a certified copy.

Q. I notice that certified copies were procured on May 2, 1952. You mailed it to her after that date?

A. My recollection would be the same date I obtained it.

Q. Do you recall where you mailed it to her? Do you recall her address?

A. The same address to which Mr. Simons was mailing checks, and it was in the 70's, either Hotel Beacon or some address in the 70's. I do not remember just when she moved.

I know there was one time she lived in the Hotel Beacon. I know that was her address at the time of the commencement of the lawsuit.

I know the address to which I mailed the certified copy of the decree was the same address that Mr. Simons was sending the alimony checks.

Q. Did you get any response to that letter enclosing the decree?

A. No, sir.

Q. Did you write a letter, or did you just enclose the decree?

A. I just enclosed the decree."

The then governing Florida Statute regarding the time within which appeals might be taken (Florida Statute, Chapter 59.08) (Appendix, p. vii), provided sixty (60) days after the entry of a final decree within which to take an appeal. The defendant (petitioner) did not appeal. The final decree of divorce passed into repose on June 30, 1952.

C) The Facts Subsequent to the Termination of the Florida Divorce Suit

Petitioner admitted that she held herself out to the public and on official records as a divorced woman (R. 113):

"The Court: Just answer the question, please, ma'am.

How did you designate yourself?

The Witness: Mostly divorced to people I had never met before.

Q. That started in 1946?

A. From that time on, except to my friends.

Q. In your employment or social security and things of that nature, how did you designate yourself?

A. Only divorced."

Sol Simons died on October 26, 1960. (R. 2 and 11) Sol Simons' last will and testament (Def. Ex. S.; R. 307-315, 203) was filed for probate by the respondent on October 31, 1960, in the County Judge's Court, in and for Dade County, Florida (Probate Case No. 51039-B), and letters testamentary were issued that same day to the respondent duly appointing it executor of the estate of Sol Simons. (R. 1-2 and 11) On February 7, 1961, petitioner filed, in the above-stated probate proceeding, her election to take dower (Def. Ex. R.; R. 306, 202), in which she swore, under oath, that Sol Simons died a domiciliary of Florida. The respondent objected to the petitioner's election to take dower on the ground that Lucy C. Simons and Sol Simons were divorced from each other in April, 1952, "by virtue of a final decree of divorce entered in chancery action 148, 091-E, in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida". (R. 2 and 11) The petitioner's claim to dower, as the alleged widow of Sol Simons, remains undisposed of in the Florida Probate Court. (R. 2 and 11)

Thereafter, petitioner instituted this suit.

D) This Case

On February 23, 1962, petitioner filed her bill of complaint in chancery in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. (R. 1-10) This suit is an original bill in the nature of a bill of review to vacate and set aside the ten (10) year old divorce decree that had been rendered by the same court on April 30, 1952. Despite the prolixity of the complaint, analysis reveals that it is a four-pronged attack upon the ten (10) year old divorce decree. The four (4) alleged grounds for setting aside the old decree of divorce, as the District Court of Appeal, Third District of Florida, postulated them, are (R. 321):

"(1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence,

(2) that the New York separate maintenance decree was a bar to the divorce suit and that it was a fraud on the court for the husband to fail to disclose the earlier proceeding,

(3) that the decree on its face showed want of jurisdiction, and

(4) that after she received notice of the divorce suit the husband lulled her into inaction."

The record establishes that the petitioner, in 1952, at the time the Florida divorce suit was pending, was interested only in preserving her New York alimony award and decided, after careful deliberation and advice of counsel, to ignore the Florida divorce suit. Consequently, petitioner made an educated decision not to appear in the Florida divorce case and contest the jurisdiction of the Florida court over the marital res, based on the claim now made that Sol Simons was not a bona fide resident of Florida, or to raise the now claimed affirmative defense that the New York separate maintenance decree awarding her alimony was res adjudicata of the cause of action for divorce in Florida. At the trial of this case, petitioner testified, on direct examination, that after she received the notice of publication and bill of complaint for divorce, she telephoned Sol Simons at his New York apartment, from her sister's New York apartment, and that the next day, conveniently accompanied by her sister, she went to see Sol Simons in his New York apartment. (R. 110) On cross-examination, petitioner pinpointed the time by stating that she called Sol Simons, from her sister's apartment in New York, the day after receipt of the notice and the complaint for divorce; and that she and her sister visited

Sol Simons in New York the following day. That pinpointing testimony reads as follows (R. 117):

"How long after you received the notice that he was applying for divorce was it that you went to see him?

A. I called him within a day or two. It must have been about three days.

Q. Then three days after you got the notice that he had sued you for divorce, you went to see him?

A. About that time.

Q. Give me some idea. Would you say the day you received the notice he was suing you for divorce?

A. No. It was the next day. I visited my sister, and I called him up.

Q. Then you went to see him the following day?

A. That's right."

Petitioner related the following as her conversation with Sol Simons (R. 110):

"Q. What was the conversation which took place there?

A. Nothing very startling. We came in, and he greeted us, and we greeted him, and we sat down.

I said, 'What is this paper?'

He said, 'Forget about it. It was in a fit of temper. Just destroy it.'

I said, 'Then I should not do anything about it?'

He said, 'Pay no attention to it. I'm not going through with the divorce,' and he repeated it again that he once said he would never give me a divorce and would never get a divorce."

Petitioner also testified that Sol Simons was angry about the fact that she had not come directly to him for an increase in alimony, rather than starting proceedings. (R. 111) She said she told him, "Well, I like everything to be done legally. I think it's the safest way, and it's the best way." (R. 111) As one might readily expect, the petitioner's sister, Helen Forman, corroborated the petitioner's version of the episode. Petitioner explained that her primary interest was in her alimony and that she took no action in the Florida divorce proceeding in reliance on Sol Simons' statement that the divorce suit would be discontinued. That testimony reads as follows (R. 111):

> "Well, I didn't think there was any necessity. I know nothing about the law, and when Mr. Simons said, 'I'm not going through with this divorce,' I had continued getting my alimony until the date of his death.
>
> I figured if he had gotten the divorce, I certainly wouldn't be getting any alimony.
>
> So, I saw no necessity of doing anything about it. I took it for granted that he meant what he said."

On cross-examination, however, the petitioner admitted that her decision to ignore the Florida divorce suit was, in fact, not based on Sol Simons' purported statement to her, but rather on the advice and counsel of her lawyer. That testimony reads as follows (R. 119-121):

> "Q. Who is Mr. Allan, an attorney you consulted about this notice immediately after you received it?
>
> A. Oh, yes, I called him. I'm sorry.
>
> He said there is no validity to that. He said, 'Pay no attention to it.'

Q. Mr. Allan told you after you received the notice that you were being sued for divorce, that it had no validity in New York?

A. Yes, sir.

Q. And told you to pay no attention to it?

A. Yes, sir.

Q. He also told you, did he not, that New York did not recognize Florida divorces?

A. Well, I had no divorce at the time.

Q. That is what Mr. Allan told you, did he not?

A. Yes.

Q. So, after Mr. Allan told you to ignore it, that it meant nothing, New York did not recognize Florida divorces, you put it away and forgot about it?

A. That's right."

* * *

"Q. After your discussions that you had detailed with your husband, you were still disturbed and wanted the advice of an attorney, did you not?

A. Well, I wanted a little verification.

Q. Sure. When your attorney told you that the Florida divorces were not recognized in New York, to forget about it, were you then satisfied?

A. I was satisfied when my husband told me that.

Q. But you were not satisfied enough, so you went to see a lawyer?

A. A great deal depended on my alimony, that my alimony was continuing, you see.

Q. What was dependent upon it?

A. My existence."

The tale told by the petitioner, which was so readily confirmed by her sister, was conclusively proven by the respondent to be naught but a figment of imagination, concocted in order for the petitioner to lay claim to some part of Sol Simons' estate. Seymour Liebman, Sol Simons' Florida lawyer, testified that after Sol Simons established residence in Florida, as of November 19, 1951, he [Sol Simons] had occasion to leave the State of Florida twice. Once, he went to New York during January, 1952, to attend the hearing on petitioner's application for an increase of alimony. (R. 158) On that occasion, Sol Simons returned to Florida within a matter of days. (R. 158-159) Def. Ex. C (R. 274, 159) is a letter written to Seymour Liebman by Sol Simons, dated February 4, 1952, referring to the New York hearing and stating that Sol Simons would be back in Miami on February 9, 1952. The other occasion was toward the end of February, 1952, when Sol Simons had to go to Chicago on business. (R. 159) On that occasion, Sol Simons wrote a letter to Seymour Liebman from Chicago, stating that he intended to go to New York on March 6th or 7th before returning to Miami. (Def. Ex. D; R. 275, 159) Seymour Liebman testified that Sol Simons drove back from New York to Miami on that occasion. (R. 160) The court admitted in evidence as Def. Ex. E (R. 277, 160) a composite exhibit comprised of paid gasoline slips signed by Sol Simons, dated as follows: March 10, 1952, Forest Hills, New York; March 12, 1952, Richmond, Virginia; March 13, 1952, Lumberton, North Carolina; March 13, 1952, Savannah, Georgia; March 14, 1952, Jacksonville, Florida; and March 17, 1952, Miami Beach, Florida. Those gas slips dated at the places indicated establish conclusively that Sol Simons was en

route from New York to Miami, Florida, from March 10 through March 17, 1952. On March 18, 1952, Sol Simons made and executed an application for an automobile title certificate, which was notarized in Dade County, Florida, on that date. (Def. Ex. F; R. 279, 160) Two ladies testified that they were public stenographers who did part-time work for Sol Simons. They each testified that they went to his apartment at the Sandpiper Villas, at 1110 Venetian Way, in Dade County, Florida, where he personally dictated correspondence to them and they in turn typed it in his presence in final form for his signature. Sylvia Sherman testified that she took dictation here in Miami, Florida, from Sol Simons on March 19, 20, 29, 31, and April 1, 26, 28, 29, and May 1, in the year 1952. (R. 185-192) Copies of the letters dictated to Sylvia Sherman by Sol Simons and transcribed by her, on the dates specified, were admitted in evidence as a composite exhibit. (Def. Ex. M; R. 297, 190) Dorothy Newhoff Cohen similarly testified that she did secretarial work for Sol Simons and that he dictated correspondence to her at his Miami Beach apartment on March 24, 25, 26, and April 8, 11, 17, and 18, in the year 1952. (R. 192-197) Copies of the correspondence for the dates stated were admitted in evidence as a composite exhibit. (Def. Ex. O; R. 300, 197) Logical deduction conclusively proves that Sol Simons was not in New York at the time when Lucy Simons and her sister testified they had a conversation with him. The Dade County Circuit Court clerk's docket stamp, in the original file of the divorce suit, proves that the notice of publication and copy of the complaint for divorce were mailed to the petitioner on March 14, 1952. (R. 217) In the regular course of mail, petitioner received those papers by no later than March 17, 1952. The conversation supposedly took place within two (2) days thereafter, which makes

it March 19, 1952, at which time Sol Simons was in Miami dictating correspondence to Sylvia Sherman.

In addition, Sol Simons' lawyer, Myron J. Greene, testified that he had conversation in New York with Lucy Simons' lawyer, Jerome Mayer, regarding the Florida divorce proceeding. (R. 96) Mr. Greene wrote to Sol Simons on April 3, 1952, and stated "in the light of recent telephone conversations which I had with Mr. Jerome Mayer, I am of the opinion that they will appear and contest your divorce action in Florida." (Pl. Ex. 5; R. 269, 97) Sol Simons wrote in reply: "I note your opinion from your conversation with Mr. Mayer that they will appear to contest my divorce action. I would welcome such an appearance which will afford me the opportunity of presenting the facts again to prove that perjury has been committed." (Pl. Ex. 6; R. 270, 97) Clearly, Sol Simons did not prevent the petitioner from appearing in the Florida divorce suit, but, on the contrary eagerly awaited her appearance in Florida. It will be recalled that Mayer (petitioner's lawyer) had no recollection of the matter and did not dispute Greene's testimony.

Def. Ex. P (R. 301, 127 and 201-202) was offered in evidence to rebut petitioner's statement that she and Sol Simons were on friendly terms. That letter was written to Sol Simons, at 1110 Venetian Way, Miami Beach, Florida, on November 20, 1957, by the petitioner and states her awareness of the fact that she and Sol Simons were not on friendly terms. (R. 302)

On October 23, 1962, at the conclusion of the trial, on the predicate of the foregoing proof, the trial judge made these findings of fact:

(1) "In my opinion, the evidence is wholly and totally insufficient to destroy the presumption of correctness of the divorce decree. I think the burden is upon the person who attacks it, and I think the evidence falls remarkably short of it." (R. 208)

(2) "I discount completely and entirely the statement that Mrs. Simons made as to the friendly relationship between her and her husband, because of the letter she wrote him saying that there is no reason why he should hate her like he does. That is in Defendant's Exhibit P." (R. 208)

(3) "That exact date has not been stated, but she stated she had this conversation over the telephone with Mr. Simons about the pendency of the divorce suit, and the next day she and her sister went out to see him.

The Clerk's certificate showed that the notice was mailed from the Clerk's office on the 14th of March. Presumably, she would not have received it before the 16th, and more likely the 17th, depending upon the day of the week, and there is testimony that the man was here dictating to two people at that time." (R. 208-209)

(4) "On this, she was lulled into a false sense of security.

Her testimony does not gibe with the facts, because she has not said when it was. But she said it was a day or two after she got it.

They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.

> After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security.
>
> From the evidence here, I do not think Mr. Simons did, and I discount her testimony as to their conversation. I do not think it is true." (R. 209-210)

There has never been any dispute that this cause was instituted approximately ten (10) years after the entry of the challenged divorce decree and after the death of Sol Simons. The respondent, as the executor of the last will and testament of Sol Simons, filed its answer denying the allegations of the complaint, asserting that the divorce decree and the proceedings leading up to it were lawful in all respects and affirmatively pleading that the petitioner was barred by laches. (R. 10-15).

On January 30, 1963, the trial court entered the final decree dismissing this cause with prejudice. (R. 315-316)

On appeal, the District Court of Appeal, Third District of Florida, whose decision it is that is under review in this Court, affirmed the trial court's dismissal of the cause. The essential portions of the holding of the District Court of Appeal, Third District of Florida, read as follows:

> "The wife had obtained a decree for separate maintenance with a support allowance in 1946 in New York. The husband sued for divorce in 1952 in Dade County, Florida. The wife, then a resident of New York, was served by publication, and received copies of the order for publication and the complaint. On advice of her attorney, she did not appear in the Florida divorce suit.

"The husband was granted a final decree of divorce in his Florida suit on May 1, 1952. He continued to pay support money as previously ordered by the New York court until he died in 1960. His will was filed and probated in Florida. The wife sought dower in the probate court. When her application for dower met objection on the ground that she was not his widow, having been divorced, she filed this suit in the circuit court. . . .

"By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons. Mabson v. Mabson, 104 Fla. 162, 140 So. 801; Bernstein v. Bernstein, 160 Fla. 654, 36 So.2d 190; MacFadden v. Muckerman, Fla. App. 1959, 116 So.2d 448. The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545; Bernstein v. Bernstein, supra. Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A., N.S. 577; Bernstein v. Bernstein, supra; Gordon v. Gordon, Fla. 1952, 59 So.2d 40; Stone v. Stone, Fla. App. 1959, 111 So.2d 486; Taylor v. Taylor, Fla. App. 1961, 130 So.2d 115.

"The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under

no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's report, which the court confirmed, showed the true situation in detail.

"The appellant's claim that the husband, in 1952 after she had notice of his divorce suit, lulled her into inaction, was properly denied by the chancellor, for her delay (Barnes v. Willis, 65 Fla. 363, 61 So. 828) and on the merits. That issue was tried before the chancellor in the instant case, in the course of which it was required that he judge the credibility of witnesses and resolve conflicts in the evidence, and his ruling thereon is adequately supported by the record."

Thereafter, a writ of certorari was sought from the Florida Supreme Court (R. 324-334), and denied (R. 335).

The petitioner then timely applied to this Court for a writ of certiorari, which was granted on October 19, 1964. (R. 336)

QUESTION PRESENTED

Petitioner, in the "Question Presented" section of her brief (pages 3-5) has predicated the issue on the following mistaken conclusions:

(a) That Sol Simons died a domiciliary of the State of New York. That factual conclusion is thoroughly erroneous. That conclusion is unhesitatingly made by the petitioner in the face of her own sworn statement to the contrary, contained in her election to take dower. She said under oath in the stated document that Sol Simons died a domiciliary of Florida.

(b) That petitioner's right to alimony under the New York separate maintenance decree is tantamount to, or the equivalent of, a widow's right to dower in Florida.

No authority whatever is cited to support that patently incorrect legal conclusion. The continued relationship of husband and wife is not necessary for the payment of alimony, although a past relationship as such is necessary. Dower, on the other hand, is a widow's right, flowing from the marital status of husband and wife at the time of the husband's death. Alimony and dower are thus entirely different in the essential element that in the former a past relationship of husband and wife is required, whereas in the latter the relationship must persist until the death of the husband.

(c) That this case was an equity action for a determination of the petitioner's property rights in the estate of Sol Simons. That is a mistaken conclusion of both law and fact. This case was an original bill in the nature of a bill of review, brought in Florida to set aside a Florida divorce decree so that petitioner could then go back to the Florida probate court and demand a dower share in the estate of a deceased Florida domiciliary, absent the legal impediment of the Florida divorce decree, which establishes that petitioner was not the widow of the Florida decedent.

(d) That the District Court of Appeal, Third District of Florida, failed to give full faith and credit to the New York separate maintenance decree providing petitioner alimony. That conclusion is erroneously stated in the face of the opinion of the aforesaid court, which does nothing of the kind. The opinion of the District Court of Appeal, Third District of Florida, merely holds, consistent with established Florida precedent, that a Florida decree which has passed into repose by virtue of the expiration of the appeal period, cannot be attacked in Florida on grounds that could and should have been asserted in the original proceeding leading up to the assailed decree. Further-

more, petitioner readily concedes that she received every cent of alimony to which she was entitled under the New York separate maintenance decree, which makes it extremely difficult to comprehend how the District Court of Appeal, Third District of Florida, could have in any way deprived her of that which she admits she received.

(e) That the petitioner was deprived of due process of law. That legal conclusion is stated by the petitioner, notwithstanding her admission that she received notice of, and had a full opportunity to defend, the Florida divorce suit, but deliberately declined to do so, as an educated decision based on advice of counsel of her own choice, to the effect that New York did not recognize Florida divorces, and that she would continue to receive her alimony notwithstanding the entry of a Florida final decree of divorce. Certainly, Florida could not, and in fact did not, deprive her of the alimony to which she was entitled under the New York separate maintenance decree. Had Florida done so, based on constructive service of process on the petitioner, its decree to that effect would have run afoul of the full faith and credit clause of the United States Constitution, as this Court held in *Estin* v. *Estin*, 334 U.S. 541, 68 S. Ct. 1213; *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 S. Ct. 629; and *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360. It is apparently the petitioner's position that because she harbors the impression that New York does not recognize and give full faith and credit to final decrees of divorce from Florida, that Florida should therefore fail to recognize its own decrees.

These mistaken assumptions make it impossible for the respondent to accept petitioner's rather unclear statement of the issue. The respondent earnestly believes that

the issue may be accurately phrased, in accordance with the record, as follows:

Whether or Not the Full Faith and Credit Clause of the United States Constitution Was Violated by the Refusal of Florida to Vacate and Set Aside Its Own Final Decree of Divorce, Which Had Aged Ten Years Since Its Rendition and Before It Was Attacked by the Petitioner, and Which Was Jurisdictionally Founded on Constructive Service of Process on a Non-resident Defendant, Where the Florida Court in the Original Divorce Proceeding Had Subject-Matter Jurisdiction of the Marital Res by Virtue of the Fact That the Plaintiff Was a Domiciliary of Florida: Because New York Had Previously Entered a Decree of Separate Maintenance Providing Alimony for the Defendant Who, with Notice of, and an Opportunity to Defend the Florida Divorce Suit, Elected to Ignore It by an Educated Decision Based on Advice of Counsel That New York Did Not Recognize Florida Divorces?

ARGUMENT

A final decree of divorce granted by a state court of the domicile of one spouse, based on constructive service of process on the other non-resident spouse, which accords procedural due process (notice and an opportunity to defend), is entitled to full faith and credit in every other state in the union, notwithstanding that the enforcement or recognition of such decree would offend the local policy of the other state. *Williams* v. *State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207. In that case North Carolina, in a bigamy prosecution, refused to recognize and give effect to a Nevada divorce decree granted to a domiciliary of Nevada, based on constructive service of process on a non-resident North Carolina defendant. In reaching the ultimate conclusion it was very clearly held that a domi-

ciliary state has the power to alter and change the marital status of the spouse domiciled within its borders and that the cause of the marital rift was immaterial to and did not diminish the lawful power of the domiciliary state. The pertinent language of the holding in these particulars reads as follows:

> "Hence the decrees in this case like other divorce decrees are more than in personam judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power.—Citations omitted—Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service. —Citations omitted—meet the requirements of due process.—Citations omitted—Accordingly it was admitted in the Haddock case that the divorce decree though not recognized in New York was binding on both spouses in Connecticut where granted.—Citations omitted—And this Court in Maynard v. Hill, 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654, upheld the validity within the Territory of Oregon of a divorce decree granted by the legislature to a husband domiciled there, even though the wife resided in Ohio where the husband had deserted her. It therefore follows that, if the Nevada decrees are taken at their full face value (as they must be on the phase of the case with which we are presently concerned), they were wholly

effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages. . . .

"The existence of the power of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestic rift. As we have said, it is dependent on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders. Atherton v. Atherton which preceded Haddock v. Haddock and Thompson v. Thompson, 226 U.S. 551, 33 S. Ct. 129, 57 L. Ed. 347, which followed it, recognized that the power of the state of the matrimonial domicil to grant a divorce from the absent spouse did not depend on whether his departure from the state was or was not justified. As stated above, we see no reason, and none has here been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to prick out any such line of distinction in the generality of the words of the full faith and credit clause."

This Court's ultimate conclusion was stated in these words:

"So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter."

On the second appearance of the Williams case (*Williams* v. *State of North Carolina*, 325 U.S. 226, 65 S. Ct. 1092) this Court held, in essence, that even though a final decree of divorce awarded to a domiciliary based on con-

structive service of process on the non-resident spouse is entitled to full faith and credit throughout the nation, a finding of domicil by the court granting the divorce, although entitled to prima facie weight, is not conclusive in a sister state and can be relitigated in a sister state. It was held that "[t]his may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is inherent in the practical application of the concept of domicil in the context of our federal system." In other words, two states may rule contrarily on the factual issue of domicil. It was also held that this Court, in the exercise of its jurisdiction and duty to enforce the full faith and credit clause of the Constitution of the United States and the implementing congressional legislation thereunder, would not become a trial court of probate and divorce. That holding is written in the following words:

> "But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicil. 'It is not for us to retry the facts,' as was held in a case in which, like the present, the jurisdiction underlying a sister-State judgment was dependent on domicil."

The primary holding was stated as follows:

> "The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose re-examination by another State.

> Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. Thompson v. Whitman, supra. If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we cannot upset the judgment before us."

Petitioner, on page 29 of her brief, states that "[h]ere we have a case that certainly goes beyond any of the reported decisions by this Court on the subject matter", and the respondent fully agrees with that statement, because petitioner would have this Court hold that Florida, under full faith and credit, should disregard its own decrees. This is not a case within the permissible reach of Williams II, where a final decree of one state is attacked in the courts of a sister state which can inquire into the jurisdictional predicate of the final decree rendered elsewhere. This is an attack in Florida on a Florida final decree of divorce, awarded to a party found by Florida to be a domiciliary of Florida, based on constructive service of process on the non-resident spouse who was admittedly accorded procedural due process of law. The Florida court rendering the divorce decree in 1952 found that the plaintiff, Sol Simons, was a domiciliary of Florida. (R. 226

and 237) Consequently, under the authority of Williams I, Florida had the power to lawfully award Sol Simons (its domiciliary) a divorce. The petitioner failed to appear in Florida and contest the divorce suit. Her failure to do so was not a result of any alleged fraud. The trial court in this case tried that issue of fact and, on the basis of conflicting proof, found the petitioner's charges of fraud were untrue. The chancellor said "I do not think it is true." (R. 210) Petitioner's failure to appear in Florida was based on her primary concern for the preservation of the right to continue to receive the alimony awarded to her by the prior New York separate maintenance decree. She was advised by an attorney of her own choice that New York did not recognize Florida divorces (which is, of course, contrary to Williams I), and that she would continue to be entitled to her alimony under the New York decree notwithstanding the entry of a Florida final decree of divorce. The attack, therefore, in Florida, on its own final decree ten years after rendition, must be and is governed by the law of Florida in regard to the permissible scope of such an attack.

It has been settled beyond debate in Florida that a final decree of divorce that has become absolute by the passage of that period of time allowed for the taking of an appeal, cannot be assailed other than by an original bill in the nature of a bill of review, brought in the court of rendition, based upon extrinsic, as opposed to intrinsic, fraud. *Hamilton* v. *Flowers,* 134 Fla. 328, 183 So. 811; *Golden Gate Development Co.* v. *Ritchie,* 140 Fla. 103, 191 So. 202; and *Macfadden* v. *Muckerman,* 116 So.2d 448 (Fla. App. 3rd 1959). In the *Hamilton* case (*supra*), the pertinent language of the holding reads as follows (183 So. at 816):

> "If it be considered as an original bill to attack on the ground of fraud a final decree, valid on its face, and whch has become final and absolute, the bill must allege facts which would show extrinsic fraud in the procurement of the decree."

The pertinent language of the holding in the *Ritchie* case (*supra*), reads thusly (191 So. at 203):

> "Bills of review and original bills in the nature of bills of review are controlled largely by the same general principles. See Andrew v. Hecker, 132 Fla. 759, 182 So. 251. Bills of review are required to be filed within the six months' period allowed by the statute in which to take appeals and may be maintained because of matters discovered after entry of final decree and were not available for presentation to the court prior to the decree. See Shaw v. Hamm, 133 Fla. 722, 183 So. 19. Original bills in the nature of bills of review brought for the purpose of impeaching a final decree are addressed largely to the sound discretion of the court and can be permitted or allowed without leave of the court. It is usually considered as a new suit and its objective is to impeach a final decree obtained by fraud or some other equitable reason.—Citations omitted."

The complaint in the *Macfadden* case (*supra*), was a bill in the nature of a bill of review brought thirteen (13) years after the entry of a final decree of divorce on January 9, 1946, rendered by the Dade County Circuit Court seeking to set aside that decree on the ground that the bona fides of residence of the original plaintiff were false and fraudulent. At the time suit was started, the original plaintiff was dead. The court held that the complaint failed to state a cause of action since residence (domicile) was an issue in the original proceeding and could have been litigated there and then and any claim of fraud in

that regard was intrinsic as opposed to extrinsic fraud. The pertinent language of the holding reads as follows (116 So.2d at 448-449):

> "Plaintiff has appealed from an order dismissing a bill of complaint in the nature of a bill of review to set aside a decree of divorce entered in the Circuit Court of Dade County, Florida, on January 9, 1946. The order dismissed the cause with prejudice and without leave to amend.
>
> * * *
>
> ". . . In the case at bar, the appellant seeks to collaterally attack the decree some thirteen years after its rendition upon grounds which constitute intrinsic rather than extrinsic fraud. The rule is and has been that those issues that could or have been litigated in the proceedings themselves are not sufficient grounds to collaterally attack a decree which otherwise appears to be valid on its face.—Citations omitted—As opposed to intrinsic fraud, the bill of complaint does not, in our opinion, allege facts which would constitute extrinsic fraud such as the deceased husband's fraudulently keeping the appellant from defending the action, keeping her in ignorance of the proceedings, or other misconduct that would deprive the wife of an opportunity to have defended the action. . . ."

It is a permanent part of the jurisprudential panorama of Florida that a spouse served constructively with process in divorce litigation may not ignore that process with impunity and, after a decree for divorce is entered and becomes absolute by the passage of the time allowed for taking appeals, relitigate those issues which could have been raised in the original proceeding. This is merely another way of saying that a final decree may not be challenged for intrinsic elements after the time for taking an appeal has expired. In *Mabson* v. *Mabson*, 104 Fla. 162, 140 So. 801, a husband instituted suit for divorce

and served the defendant-wife constructively. She had left him to take up residence in New York. She admitted that she received the notice of suit but contended that it was defective because the return day was twenty-seven (27) days instead of twenty-eight (28) days from the date of the first publication of notice. The wife failed to exhibit her original bill in the nature of a bill of review raising the objection until several years after the decree had been rendered. In the meantime, she litigated in New York, based on personal service on the husband, the question of alimony. It appears that when the wife received the notice of the Florida divorce proceeding she discussed it with her lawyer in New York and apparently decided to ignore the Florida proceeding. This is a strikingly similar circumstance to what occurred in the instant case. The rule enunciated in that case is best expressed in the language of the Florida Supreme Court, contained in its syllabus under note six, which reads as follows (140 So. at 801):

> "6. Where the defendant is actually served with process which may be defective in form, or subject to the objections that may be waived by the defendant, the defendant cannot with impunity ignore the actual service of the kind of notice which he has received, but must ordinarily submit his objections in this regard to the court from which the process issued, in order to take advantage of them."

Mabson stands for the proposition that an original bill in the nature of a bill of review will not lie to protest procedural defects where notice is received but ignored. Moreover, Mabson is significant because it establishes that notice plus intentional disregard of pending proceedings constitutes an estoppel against an original bill in the nature of a bill of review to vacate a final decree of divorce.

The pertinent language of the court's holding in that respect reads thusly (140 So. at 805-806):

> "Without adjudicating the legal effect of the publication as made of the process in the divorce suit against the complainant in this cause, she should not be permitted to maintain this suit because of her conduct. It appears from the complainant's bill in the nature of a bill of review that she received from the clerk of the court, under the statute, notice of the pendency of the divorce suit against her and had reasonable opportunity to present therein her defenses and claims for alimony, but intentionally refrained from asserting her rights in the Florida court and proceeded with her suit in the courts of New York, which courts held that her claims should have been presented to the courts of Florida. Under such circumstances, equity will not entertain a bill in the nature of a bill of review brought by the complainant to challenge the validity of a decree entered by the Florida court in a divorce suit against complainant, of which she had notice and an opportunity to be heard, but intentionally omitted to assert her claims as to matters now sought to be presented for adjudication."

In the case of *Matsis* v. *Matsis*, 155 Fla. 786, 21 So.2d 545, the Florida Supreme Court held that a wife who intentionally refrained from contesting a divorce suit in Florida after having received notice could not maintain an original bill in the nature of a bill of review to set aside the final decree of divorce nine (9) months after its rendition on the following grounds: (a) that the husband committed fraud by concealing and not alleging his prior unsuccessful divorce litigation in New Hampshire based on the same grounds asserted for divorce in Florida, and in which proceeding New Hampshire entered a separate maintenance decree providing the wife with alimony, and

(b) that the grounds for divorce were insufficient and uncorroborated. The significance of the Matsis case is twofold: (1) it establishes that neither failure by a husband to allege his prior unsuccessful marital litigation based on the same grounds nor insufficiency of the proof to establish such grounds for divorce are appropriate grounds for an original bill in the nature of a bill of review to set aside a final decree of divorce; and, (2) that a wife who received notice of the proceeding but refrained from contesting the case is estopped to assail the final decree after the expiration of the appeal period. The pertinent language of the Florida Supreme Court's holding reads as follows (21 So.2d at 546):

> "It is our view that there is no equity in the bill, and that the motion to dismiss should have been granted. The allegations of the bill of complaint show not fraud but an attempt by the wife to relitigate issues which should have been presented in the original suit and which have been foreclosed by the entry of the final decree and the lapse of the statutory time within which to take an appeal. If the decree entered in the New Hampshire court did in fact constitute a bar to any subsequent suit by the husband on the same issues, it was Mrs. Matsis' duty to assert such defense in the original suit in timely manner, if she cared to avail herself of such defense. See Harrison v. Harrison, 19 Ala. 499. If the evidence offered by Mr. Matsis to sustain his bill was insufficient, the place to have made the objection was in the original suit; there being at least some evidence offered by the plaintiff in the original suit to prove his cause of action. Having intentionally refrained from asserting her defenses or contesting the issues in a suit of which she had due and legal notice and an opportunity to be heard, Mrs. Matsis may not now be heard to question the final decree in this collateral proceeding instituted after the time for appeal has expired.—(Citations omitted)—"

It will be observed that the court noted that the prior marital litigation was defensive and should have been alleged and proven by the wife in the original proceeding. To the same effect are the cases of *Coleman* v. *Coleman*, 157 Fla. 515, 26 So.2d 445, and *Bernstein* v. *Bernstein*, 160 Fla. 654, 36 So.2d 190. In the Bernstein case the following was stated (36 So.2d at 191):

> "The suit for support and maintenance is not a bar to a suit for divorce.—(Citation omitted)—It may be expedient in a hill for divorce to recite the fact of proceedings in a foreign court for support and maintenance if they are in case, but that is not essential to the sufficiency of the bill for divorce. Such proceedings are matters of defense and the chancellor is at liberty to deal with them as the circumstances may seem meet since he has acquired jurisdiction of the plaintiff."

In *Masilotti* v. *Masilotti*, 158 Fla. 663, 29 So.2d 872, the divorced wife brought suit after the final decree became absolute and after the original plaintiff was dead alleging that she had been induced not to resist the divorce and to enter into a property settlement agreement by a threat of abandonment. Admittedly, she had notice of the divorce proceeding. The complaint was dismissed in the Circuit Court and the Florida Supreme Court affirmed, pointing out in conclusion that the original plaintiff was dead and the suit brought challenging the decree was foreclosed because it was instituted after a lengthy lapse of time, which, interpolating the facts recited in the opinion was about two (2) years after the rendition of the decree. The holding of the chancellor, quoted with approval by the Florida Supreme Court, in part reads as follows (29 So.2d at 873):

> "'It is abundantly clear that she had notice of the suit long prior to its conclusion and, in fact, states

in her bill of complaint that she believed "that the decree against her would follow as a matter of course in the absence of opposition by her."

In the case of Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545, it was said:

> 'Where wife intentionally refrained from contesting issues in divorce suit of which she had due notice and an opportunity to be heard, wife could not question final decree by bill in nature of bill of review * * *.'"

Another case in point both legally and factually is *Barnes* v. *Willis,* 65 Fla. 363, 61 So. 828. That case represents a wife's attack upon an eleven (11) year old divorce decree subsequent to the death of the original plaintiff-husband. The thrust of the wife's assault against the decree was that the husband, shortly after the divorce suit was begun, told her it would be dismissed and she need not defend. The Florida Supreme Court held that acquiescence for eleven (11) years and until after the original plaintiff-husband was dead, constituted an estoppel. The pertinent language of the holding reads as follows (61 So. at 829):

> ". . . she willingly acquiesced in the proceedings and in the divorce decree obtained in 1900, . . . and she did not institute proceedings to annul the divorce decree until 1911. This delay and conduct estop her from complaining."

In the instant case, the now complaining wife was duly served and had notice of the Florida divorce proceeding but chose to ignore those proceedings for almost ten (10) years and until after the original plaintiff-husband was dead. All of the grounds urged by the petitioner to set aside the old divorce decree constitute a challenge upon intrinsic matters which could have been

litigated in the original proceeding except for the ground based on the alleged statement made by the now deceased original plaintiff that the suit would be dismissed. That ground is a factual figment of the petitioner's imagination corroborated by her all too eager sister. The proof established that Sol Simons was nowhere near where plaintiff claims he was when they had the supposed conversation. The proof established that he was in Florida when she claimed he was in New York. The evidence was conflicting. The chancellor resolved the conflict against the petitioner which precludes further consideration. The citation of authority is surely unnecessary to support the principle that appellate courts do not substitute their version of the facts for that of the chancellor. Additionally, it appears from the authorities cited that the petitioner, having had notice of the divorce proceedings and having allowed ten (10) years to elapse and instituting this proceeding after the death of the husband, is estopped by silence and barred by laches. It is indeed easy to make a charge against a person whose lips are sealed by death. Petitioner knowingly accepted the status of being divorced so long as she received her alimony payments. It is patently clear that in Florida petitioner is validly divorced and barred from attacking the final divorce decree.

Before leaving Florida law it is incidentally important to take cognizance of that line of Florida cases which hold that a decree of a sister state must be pleaded and proven and that its res adjudicata or estoppel by judgment effect, under full faith and credit, must be decided after careful judicial scrutiny. If the causes of action are identical, then the prior judgment of the sister state, by virtue of full faith and credit, is res adjudicata. However, if the causes of action are not identical, then it is, by virtue of

full faith and credit, only an estoppel by judgment of the facts that were previously litigated and actually adjudicated by the court in the sister state. See *Bagwell* v. *Bagwell*, 153 Fla. 471, 14 So.2d 841; *Gordon* v. *Gordon*, 160 Fla. 838, 36 So.2d 774, 59 So.2d 40 (1952, Fla.), *cert denied*, 344 U.S. 878, 73 S. Ct. 165; *Berman* v. *Berman*, 103 So.2d 611 (1958, Fla.); *Reynolds* v. *Reynolds*, 117 So.2d 16 (Fla. App. 1st, 1959); and *Katz* v. *Katz*, 159 So.2d 241 (Fla. App. 3rd, 1964), *cert. denied*, 166 So.2d 594 (1964, Fla.), *cert. denied*, ... U.S. ....., 85 S. Ct. 276. The significance of these cases is that they constitute the line of authority espousing the legal principles that would have governed had the petitioner appeared in the Florida divorce suit in 1952 and affirmatively alleged the defense of res adjudicata by reason of the New York separate maintenance decree. The burden of pleading and proof would have been hers and no one can crystal-ball gaze and predict the result. As this Court held in Williams II "[i]t is not for us to re-try the facts." The petitioner had notice and an opportunity to raise the now alleged affirmative defense of res adjudicata. Universally, affirmative defenses not raised are waived. Surely, after all of these many years and the intervening death of Sol Simons, the petitioner cannot either reasonably expect to or reasonably be permitted to resurrect defenses that she voluntarily abandoned a decade ago.

The petitioner urges that this case is controlled by the so-called trilogy of opinions of this Court in the cases of *Estin* v. *Estin*, 334 U.S. 541, 68 S. Ct. 1213; *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 S. Ct. 629; and *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360. These cases are in point but afford petitioner no solace. They establish what has become commonly called the divisible divorce concept. That concept recognizes that the courts of the

domiciliary state of one spouse may lawfully grant a divorce and thereby alter and change the marital status of the parties either before or after the courts of a sister state have adjudicated the wife's right to alimony based on personal service of process. In *Estin* v. *Estin, supra,* the parties were married in 1937 and lived together in New York until 1942, when the husband left the wife. In 1943, the wife started an action in New York against the husband for separate maintenance and that court found that the husband had abandoned the wife and awarded her $180 per month permanent alimony. In 1944, the husband went to Nevada and started a divorce suit there. The non-resident wife was served constructively but did not appear. The Nevada court granted the husband an absolute divorce on the ground of three years continual separation without cohabitation. The Nevada decree made no provision for alimony. After entry of the Nevada divorce decree the husband stopped paying the alimony provided for in the New York decree. The wife sued in New York for a judgment for the alimony arrearage. The husband appeared and sought to have the alimony provision of the New York decree stricken by reason of the Nevada decree. The New York courts all denied the relief sought by the husband. This Court granted the husband's petition for a writ of certiorari and after consideration of the merits affirmed the courts below. On the turnpike to the result, this Court held that a domiciliary state had the power to change the status of the spouse living within its territory, as follows:

> "Marital status involves the regularity and integrity of the marriage relation. . . . The interest of the State extends to its domiciliaries. The State should have the power to guard its interest in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest

reaches of the nation. . . . These are matters of legitimate concern to the State of the domicile. They entitle the State of the domicile to bring in the absent spouse through constructive service. In no other way could the State of the domicile have and maintain effective control of the marital status of its domiciliaries.

"Those are the considerations that have long permitted the State of the matrimonial domicile to change the marital status of the parties by an ex parte divorce proceeding, Thompson v. Thompson, 226 U.S. 551, 33 S. Ct. 129, 57 L. Ed. 347, considerations which in the Williams cases we thought were equally applicable to any State in which one spouse had established a bona fide domicile."

Further along the road to the result this Court held that the state where the wife resides and which has previously adjudicated her right to alimony, was rightfully concerned that such alimony continue lest the wife become a public charge. The result was stated as follows:

"The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."

Mr. Justice Frankfurter's dissent emphasizes the impact of the Court's decision by stating:

"Nevada merely established a change in status. It was for New York to determine the effect, with reference to its own law, of that change in status. If it was the law of New York that divorce put an end to its separate maintenance decree, the respondent's decree would have been terminated not by the Nevada

divorce but by the consequences, under the New York law, of a change in status, even though brought about by Nevada. Similarly, Nevada could not adjudicate rights in New York realty, but, if New York law provided for dower, a Nevada divorce might or might not terminate a dower interest in New York realty depending on whether or not New York treated dower rights as extinguished by divorce."

In the *Armstrong* case, *supra*, a Florida domiciliary obtained a Florida divorce from his wife, who had separated from him and who took up residence in Ohio. The wife was served constructively in the Florida divorce proceeding and did not appear. The Florida divorce purportedly adjudicated that the wife was not entitled to alimony. Subsequently, the wife instituted suit in Ohio for divorce and alimony. The Ohio court denied the wife a divorce, even though she proved grounds for a divorce, because Florida had previously decreed a divorce between the parties which effectively changed their status; but provided the wife with permanent alimony. The question presented was whether Ohio denied full faith and credit to the Florida divorce decree which purportedly adjudicated and denied the wife the right to alimony. The majority opinion appears to have side-stepped the issue by holding that the Florida court did not mean what it said, because it had no power to deprive the wife of alimony in an ex parte divorce proceeding. The concurring opinion of Mr. Justice Frankfurter encouragingly establishes that a writ of certiorari may be improvidently issued on preliminary examination. He said:

> "On my study of the record I would dismiss the writ as improvidently granted. . . . The inevitably cursory consideration that is normally given in a case on the preliminary round precludes the assumption that a tentative finding of a federal question will survive the thorough study of the record which consid-

eration of a case on the merits implies. Therefore, it is that cases have again and again been dismissed for want of jurisdiction, i.e., a substantial federal question was found wanting; on the contrary, it became clear that the state court judgment rested on an adequate state ground. . . .

"The Court not infrequently is required to find its way through a tangled or confused record in order to determine whether a state court judgment turned on a state ground or on a federal ground. In short, the Court has jurisdiction to decide whether it has jurisdiction. But when adequate analysis discloses that a state judgment amply rests on a state ground, we are barred from proceeding to the merits of the alleged federal question. The appropriate disposition is to dismiss the case for want of jurisdiction."

The concurring opinion of Mr. Justice Black, joined in by The Chief Justice and Mr. Justices Douglas and Clark, is enlightening and indeed establishes the respondent's position in this case. It was stated:

"There was nothing novel in our holding in Estin v. Estin that a State where one of the parties to a marriage is domiciled can dissolve the marriage without personal service but that it cannot render a personal decree granting or denying alimony. The distinction between a decree which grants a divorce and one which grants a personal money judgment was recognized and the reasons for the distinction were stated by this Court in Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565. The state courts have long recognized the rule that a court lacking personal jurisdiction over a husband cannot render a valid alimony judgment against him. We see no reason why a court lacking personal jurisdiction over a wife should be allowed to render a valid judgment denying alimony to her. Personal jurisdiction is as necessary to protect a wife's interests as it is to protect a husband's."

In the *Vanderbilt* case, *supra*, the husband obtained an ex parte divorce in Nevada. The wife then sued for alimony in New York. The husband appeared in New York and urged the denial of alimony by reason of the full faith and credit that must be accorded to the Nevada divorce decree. Once again this Court held that the divorce decree, though valid and entitled to full faith and credit, could not, without personal service of process on the defendant, terminate the right to alimony. Mr. Justice Frankfurter's dissent takes the position that full faith and credit requires, not just a recognition of the power of the domiciliary state of one of the spouses to sever the bonds of matrimony, but also the power to terminate the right to alimony as well. The dissent of Mr. Justice Harlan, standing on the foundation of Williams I, takes the position that an ex parte divorce granted by a domiciliary state of one of the spouses, must be recognized as severing the bonds of matrimony and changing the marital status of the parties; but that its actual effect outside the domiciliary state of the spouse obtaining the divorce, is a question that should be left, not to every other state, but only to the domiciliary state of the wife at the time the divorce was granted. The idea was to prevent wives, after an ex parte divorce, from becoming migratory alimony huntresses. In the circumstances, Mr. Justice Harlan determined, in his dissent, that the ex parte Nevada divorce, given full faith and credit, precluded New York from awarding alimony to the wife.

No matter how these cases are taken, from majority opinions, concurring opinions or dissents, the petitioner's position in this case finds not a whisper of support. The circumstances existing between Sol Simons and the petitioner, after the Florida divorce decree was entered in 1952, and until his death in 1960, were in strict accord-

ance with these authorities. The parties were divorced by virtue of the Florida divorce decree, which changed their marital status. The petitioner continued to receive her alimony payments pursuant to the New York decree until Sol Simons died. The interest of Florida in changing the status of its domiciliary (Sol Simons) was satisfied and the interest of New York in its domiciliary (the petitioner) not being left pauperized and a public charge was similarly satisfied. Florida made no attempt, as was the case in Armstrong and Vanderbilt, to deny the nonresident wife alimony. Petitioner's New York alimony decree remained wholly undisturbed and totally honored throughout the life of Sol Simons. What the petitioner is truly asking this Court to do is to extend the New York alimony decree beyond its own scope and transpose it into a dower share in a Florida estate of a deceased Florida domiciliary who had been validly divorced in Florida. Translated into the context of a constitutional proposition, it means that the domiciliary state that validly granted a divorce in 1952, should not give its own decree full faith and credit. Perhaps petitioner wants some obscure and unrevealed New York law in regard to dower to have an extraterritorial effect in Florida in regard to a Florida domiciliary's estate, which is composed entirely or personalty located in Florida. Petitioner would have the local law of New York govern matters of status of Florida domiciliaries and Florida property. This unusual proposition is evidently based on the legal advice that the petitioner received back in 1952 that New York does not recognize Florida divorces. Florida did not fail to give full faith and credit to the New York separate maintenance decree. However, it appears that Florida is expected to give no credit to its own decree because some members of the bar of New York appear to think little of the juris-

prudence of Florida. This case presents a splendid opportunity for this Court to let everyone know that the states of this union are of equal dignity. Petitioner has clearly twisted and distorted the divisible divorce concept thoroughly out of recognition.

Regarding dower, this Court held in *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U.S. 314, 42 S. Ct. 358, as follows:

> "Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation, and it always has been deemed subject to regulation by each state as respects property within its limits."

Inchoate dower is given birth in marriage and dies in divorce. For dower to become consummate a man must die married. The interposition of divorce between marriage and death terminates dower. Among the numerous fallacies in petitioner's argument is the underlying one that blatantly overlooks the simple factor that an adjudication of a wife's right to alimony and the payment thereof does not require the continued relationship of husband and wife. In fact, most times in divorce suits the final decree severs the bonds of matrimony, terminates all incidents of the relationship of husband and wife, including inchoate dower; but specifically provides for permanent alimony to be paid until the death of either of the parties or the earlier remarriage of the wife. Unquestionably, under the divisible divorce concept, the right to receive alimony is in no wise dependent on the continued relationship of husband and wife, which can be severed by the domiciliary state of one spouse on the foundation of constructive service of process. However, can the divisible divorce concept be logically expanded from ali-

mony to dower, so that a man can be validly divorced and the marital status altered, but the right to dower preserved? If that is possible, and a dower share is a third of a man's estate, then all he needs is three ex parte divorces, and he has no estate left to dispose of. Carried slightly further, if he married again and had a fourth wife, only God knows what would happen then. Moreover, one wonders what will happen to the banks and title companies in this country who have, as a commonly known standard practice, passed titles on the basis that a valid constructive service divorce terminates dower. If this Court were to expand the divisible divorce concept to allow the petitioner's claim, it seems to follow, like the day the night, that there will be both a vast number of clouded titles and suicides in the banking and title insurance industries in this nation. It seems obvious that there is no question that once the domiciliary state in a constructive service divorce proceeding grants a divorce to its domiciliary and thereby changes the marital status of the parties, that such change carries with it the effect given by the law of the domiciliary state. That is really what this case is all about. In Florida, divorce terminates dower. The following appears in 11 Fla. Jur., *Dower*, Sec. 15, at page 46:

> "A final decree of divorce puts an end to a wife's right of dower and is a complete defense to any claim for dower at the death of the husband. This is true regardless of which spouse secures the divorce. This rule rests on the evident fact that when the marriage relation is terminated by divorce, the woman ceases to be the wife of the man and on his death does not become his widow."

The Florida Supreme Court, in *Bowler* v. *Bowler*, 159 Fla. 447, 31 So.2d 751, held:

> "Dower rights in this State are controlled by statute and do not become vested until the death of the husband, leaving the wife surviving him. Bennett v. Bennett, Fla., 26 So.2d 650. It is also settled that dower rights, being inchoate, are also extinguished by divorce decreed at the instance of either parties.
>
> North v. Ringling, 149 Fla. 739, 7 So.2d 476."

The precise questions of whether dower is terminated in Florida by a Florida divorce decree based on constructive service of process was affirmatively answered in *North* v. *Ringling*, 149 Fla. 739, 7 So.2d 476. The divorce decree involved in that case was based on constructive process. (See *Ringling* v. *Ringling*, 117 Fla. 423, 158 So. 125) After the husband's death the wife sought to set aside the final decree of divorce by the vehicle of a bill in the nature of a bill of review in order to clear the way for a dower claim against the dead former husband's estate. Which is exactly what the petitioner seeks to do. The pertinent language of the Florida Supreme Court's holding that dower had been terminated by the divorce decree based on constructive service reads as follows (7 So.2d at 481):

> "In the absence of statute saving it a final decree of divorce puts an end to the wife's right of dower and is a complete defense to any claim for dower at the death of the husband. This is true regardless of which spouse secures the divorce. In the case at bar, no claim for dower was asserted at the time of the final decree of divorce, nor was it ever mentioned until after the death of John Ringling. It is now attempted to be reached by bill in the nature of a bill of review."

Hence, Florida law is settled and clear that divorce ends dower. Sol Simons and the petitioner were divorced in

1952, and her claim to dower in Florida is thoroughly without merit.

Before closing, one additional feature of this case should be explored. It is evident that petitioner seeks to extend the obligation of Sol Simons to pay her alimony by virtue of the New York separate maintenance decree as a charge against his Florida estate in the form of a claim for a dower share. In addition to the other reasons establishing the invalidity of that contention, alimony does not persist past the death of the husband. Petitioner mistakenly cited *Aldrich* v. *Aldrich*, 163 So.2d 276 (1964, Fla.) for the rule that an alimony award in a divorce decree for the lifetime of the former wife is a charge upon the estate of the husband. No doubt, unpaid alimony accruing up to the time of the death of the former husband is a charge upon his estate. But that is not what the Aldrich case is about. The Florida Supreme Court decided that case on a certification of questions of Florida law from this Court. *Aldrich* v. *Aldrich*, 375 U.S. 75, 84 S. Ct. 184; 375 U.S. 249, 84 S. Ct. 305. The case arose in West Virginia. The parties had been divorced in Florida. The Florida divorce decree provided for alimony to be paid after the husband's death as a charge against his estate. The husband died a resident of West Virginia, where his estate was probated. The former wife filed a claim against his estate for continued alimony. The West Virginia courts held that the Florida divorce decree, as to alimony after the death of the husband, was erroneous and therefore not entitled to full faith and credit. The Florida Supreme Court, in response to this Court's certification of questions, answered that alimony did not persist after the death of the husband in the absence of statute (which Florida has not enacted), or agreement. The Florida divorce decree was thus held erroneous, but due to the

elapse of the appeal period (the decree not having been appealed) it passed into verity and was unassailable in Florida. This Court, upon the Florida Supreme Court's statement of Florida law, reversed the West Virginia decision and held that even though erroneous, a decree of a sister state, which has passed into verity by virtue of the elapse of the appeal period, must be accorded full faith and credit. *Aldrich* v. *Aldrich*, 378 U.S. 540, 84 S. Ct. 1687. In regard to alimony after death the Florida Supreme Court previously held, in *Underwood* v. *Underwood*, 64 So. 2d 281, 288 (1953, Fla.):

> "... By its very nature alimony is limited to the lifetime of the husband."

New York has similarly decided the issue that alimony does not persist past the death of the husband. *Daggett* v. *Commissioner*, 128 F.2d 568 (9th Cir. 1942), *cert denied*, 317 U.S. 673, 63 S. Ct. 78; *Wilson* v. *Hinman*, 182 N.W. 408, 75 N.E. 236; *Barnes* v. *Klug*, 129 App. Div. 192, 113 N.Y.S. 325; *Re Golding*, 127 Misc. 821, 216 N.Y.S. 593; *Re Schnirman*, 167 Misc. 809, 4 N.Y.S. 2d 800; *Re Van Arsdale's Will*, 190 Misc. 968, 75 N.Y.S. 2d 487; *Re Baratta's Estate*, 199 Misc. 246, 192 N.Y.S. 2d 766, *affd.*, 279 App. Div. 992, 112 N.Y.S. 2d 493; and *Re Grimley's Estate*, 200 Misc. 901, 107 N.Y.S. 2d 129. Consequently, petitioner seeks to extend the effect of her New York alimony decree in Florida beyond the limits permissible either in New York or in Florida.

CONCLUSION

Florida granted a valid divorce based on constructive service of process to Sol Simons, a domiciliary of Florida, which changed the marital status of the parties from mar-

ried to single or divorced, and never in any way at all either attempted to, or did it interefere with the prior New York separate maintenance decree providing alimony to petitioner. Sol Simons honored to his death the New York alimony award. He died a domiciliary of Florida, leaving nothing but personal property located in Florida. Petitioner's claim to dower in Florida is defeated by the valid Florida divorce decree and the law of Florida as to the effect that divorce ends dower. Florida did nothing more than give its own decree recognition. There has never been a denial of full faith and credit in Florida of the New York alimony decree, the efficacy of which terminated both in New York and Florida at the death of Sol Simons. Perhaps New York discriminates against Florida decrees, but Florida has not discriminated against the New York decree. It is indeed time, long past due at that for Florida to be considered by all as a member of the union, and her decrees honored as she honors those of all other states.

Wherefore, the respondent respectfully prays that the writ of certiorari heretofore granted in this cause on the 19th day of October, 1964, be quashed as improvidently issued or, in the alternative, the decision of the District Court of Appeal, Third District of Florida, be affirmed.

Respectfully submitted,

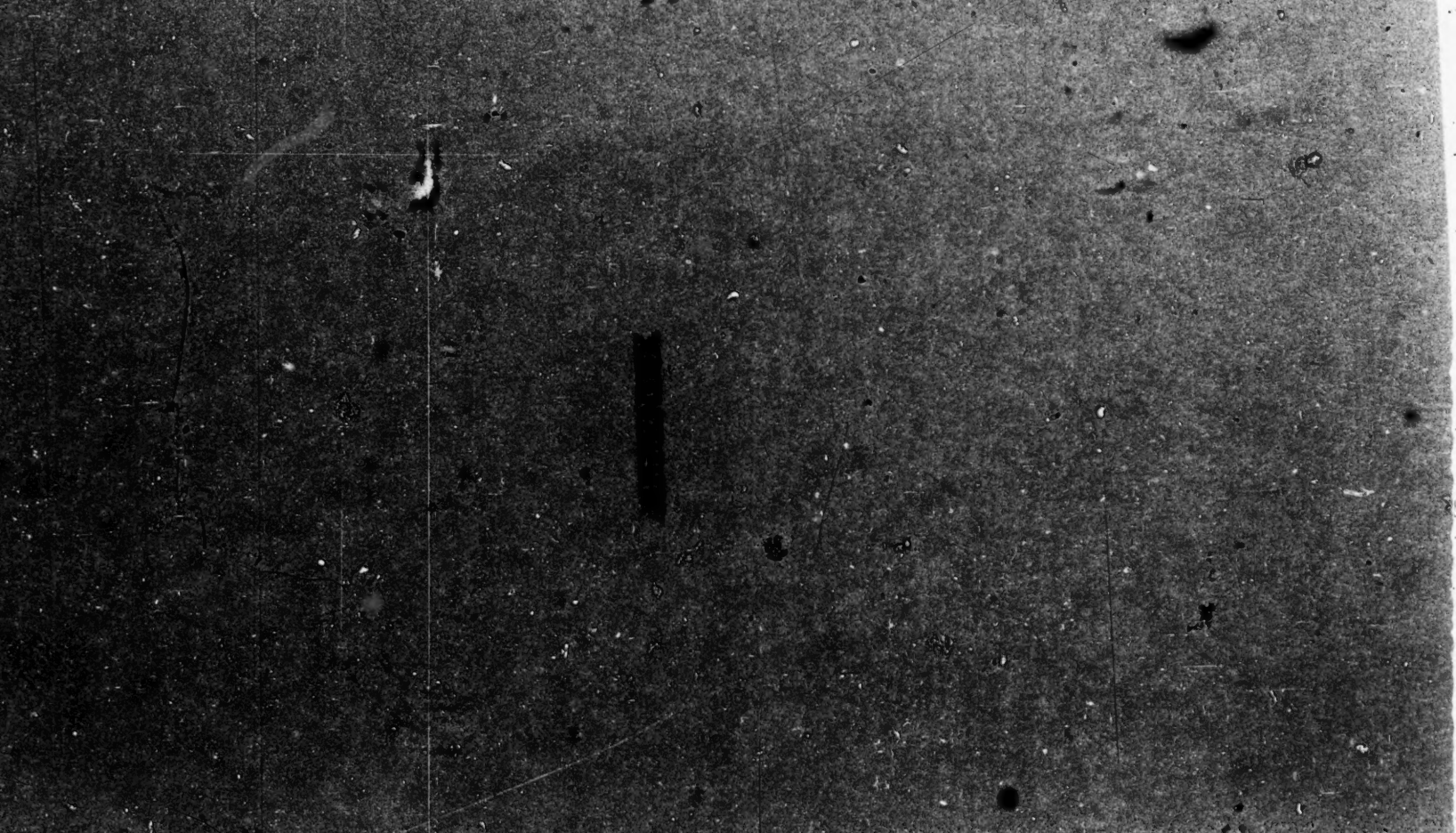
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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) true and correct copies of the above and foregoing Brief for Respondent on the Merits were furnished, by mail, by depositing same in a United States mail box, with first class postage prepaid, addressed to counsel of record for the petitioner, William Gresham Ward, 1240 DuPont Building, Miami, Florida 33131, on this 22nd day of February, 1965.

IRVING B. LEVENSON



APPENDIX

1. § 731.35(1), Florida Statutes, 1959:

"731.35 Election To Take Dower.—

"(1) In order to take dower, a widow must so elect by an instrument in writing, signed by her and acknowledged or sworn to by her before any officer authorized to take acknowledgments or to administer oaths, and filed, within nine months after the first publication of the notice to creditors, in the office of the county judge in whose court the estate of the deceased husband is being administered. The county judge shall record all elections to take dower."

2. § 65.01, Florida Statutes, 1951:

"65.01, Divorce To Be By Bill In Equity.—Suits for divorce shall in all cases be by bill in equity."

3. § 65.02, Florida Statutes, 1951:

"65.02 Residence Required.—In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint."

4. § 65.03, Florida Statutes, 1951:

"65.03 All Divorces To Be A Vinculo.—No divorce shall be from bed and board, but every divorce shall be from bonds of matrimony."

5. § 65.04, Florida Statutes, 1951:

"65.04 Grounds for Divorce.—No divorce shall be granted unless one of the following facts shall appear:

"(1) That the parties are within the degrees prohibited by law.

"(2) That the defendant is naturally impotent.

"(3) That the defendant has been guilty of adultery.

"If it shall appear to the court that the adultery complained of was occasioned by collusion of the parties, and done with the intent to procure a divorce, or that both parties have been guilty of adultery, no divorce shall be decreed.

"(4) Extreme cruelty by defendant to complainant.

"(5) Habitual indulgence by defendant in violent and ungovernable temper.

"(6) Habitual intemperance of defendant.

"(7) Willful, obstinate and continued desertion of complainant by defendant for one year.

"(8) That the defendant has obtained a divorce from the complainant in any other state or country.

"(9) That either party had a husband or wife living at the time of the marriage sought to be annulled."

6. § 65.06, Florida Statutes, 1951:

"65.06 Proceedings against Nonresident Defendants.—Bills for divorce may be brought against defendants residing out of the state, and service shall be effected upon them as in other cases in chancery."

7. § 48.01 (4), Florida Statutes, 1951:

"48.01 Service of Process by Publication, In What Cases.—Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in § 48.02 in any suit or proceeding:

"(4) For divorce or annullment of marriage;".

8. § 48.02 (1), Florida Statutes, 1951:

"48.02 Service Of Process By Publication, Upon Whom.—Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including:

"(1) Any known - - - natural person, - - -."

9. §48.03, Florida Statutes, 1951:

"48.03 Sworn Statement As Condition Precedent.—

"(1) As a condition precedent to service by publication, there shall be filed in the cause a statement executed by the plaintiff, his agent or attorney, setting forth substantially the matters hereafter required, which statement may be contained in the initial or other pleading, if sworn to, or in any affidavit or other sworn statement.

"(2) The word 'plaintiff' as used in this chapter shall extend to any party in the cause who may be entitled to service of original process upon any party to the cause or any person who may be brought in or allowed to come in as a party by any lawful means.

"(3) After the entry of a final judgment or decree in any cause no sworn statement shall ever be held defective for failure to state a required fact if the said fact otherwise appears from the record of the cause."

10. §48.04, Florida Statutes, 1951:

"48.04 Sworn Statement, Natural Person as Defendant.—The sworn statement of the plaintiff, his agent or attorney, for service of process by publication against a natural person, shall show:

"(1) That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant; and,

"(2) Whether such person is over or under the age of twenty-one years, if his age is known, or that his age is unknown; and

"(3) In addition to the above, that the residence of such person is, either:

"(a) Unknown to the affiant; or

"(b) In some state or country other than the State of Florida, stating said residence if known; or,

"(c) In the State of Florida, but that he, (i) has been absent from the state for more than sixty days next preceding the making of the sworn statement, or (ii) conceals himself so that process cannot be personally served upon him, and that affiant believes that there is no person in the State of Florida upon whom service of process would bind said absent or concealed defendant."

11. § 48.08, Florida Statutes, 1951:

"48.08 Notice to Appear, Form.—Upon filing the sworn statement, and otherwise complying with the foregoing requirements, the plaintiff shall be entitled to have issued by the clerk or judge, not later than sixty days after the filing of the sworn statement, a notice to appear, which notice shall set forth:

"(1) The names of the known natural defendants; the names, status and description of the corporate defendants; a description of the unknown defendants who claim by, through, under or against a known party which may be described as 'all parties claiming interests by, through, under or against (name of known party)' and a description of all other unknown defendants which may be described as 'all parties hav-

ing or claiming to have any right, title or interest in the property herein described';

"(2) The nature of the suit or proceeding in short and simple terms (but neglect to do so shall not be construed as jurisdictional);

"(3) The name of the court in which the suit or proceedings were instituted and an abbreviated title of the case;

"(4) The description of real property, if any, proceeded against."

12. § 48.09, Florida Statutes, 1951:

"48.09 Notice to Appear, Return Day.—The notice to appear shall require the defendant to file an appearance in such proceeding on a day (which need not be a rule day), to be definitely fixed by said notice to appear, not less than twenty-eight nor more than sixty days from the date of the executing of the said notice to appear."

13. § 48.10, Florida Statutes, 1951:

"48.10 Notice to Appear, Publication, Proof and Recording Thereof.—(1) All such notices to appear shall be published once during each week for four consecutive weeks (four publications being sufficient) in some newspaper published in the county where the court is located, said newspaper to meet such requirements as may be prescribed by law for such purpose.

"(2) Proof of such publication shall be made by affidavit of either the owner, publisher, proprietor, editor, business manager, foreman or other officer or employee of such newspaper having knowledge of such publication, which affidavit shall set forth or have attached a copy of said notice, shall set forth the dates of each publication and otherwise comply with the requirements of law, and shall be recorded in the

chancery order book or minute book of the court wherein the suit or proceeding is pending, unless a certificate thereof be made as provided in § 48.12."

14. § 48.13, Florida Statutes, 1951:

"48.13 Notice to Appear, Mailing of.—If the residence of any defendant or other party to be served by publication shall be stated in the sworn statement with more particularity than the name of the state or country in which the defendant resides, the clerk, or the judge if there be no clerk of such court, shall mail a copy of such notice by United States mail, with postage prepaid, to each such defendant within ten days after the making of the notice, the date of mailing to be noted on the docket."

15. § 48.14, Florida Statutes, 1951:

"48.14 Time for Appearance, Decrees Pro Confesso and Default Judgments.—A defendant shall be required to enter his written appearance on the day fixed in the notice to appear and upon proof of publication or posting as prescribed by law a decree pro confesso or default judgment may be entered by the clerk at any time when any defendant is found to be in default for want of an appearance, which decree or judgment shall be recorded as are other orders."

16. § 59.08, Florida Statutes, 1951:

"59.08 Time for Taking Appeals or Filing Petitions for Certiorari.—Appeals, including petitions for review by certiorari, or proceedings in the nature of certiorari, shall be taken or filed within sixty days from and after the entry of the order, decision, judgment, or decree appealed from."